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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRANDON CHOW et al., Plaintiffs and Appellants, v. SAN DIEGO COUNTY CIVIL SERVICE COMMISSION, Defendant and Respondent, SHERIFF WILLIAM B. KOLENDER et al., Real Parties In Interest.	D043360 (Super. Ct. No. GIC802676)

APPEAL from an order of the Superior Court of San Diego County, Janis Sammartino, Judge. Affirmed in part, reversed in part.

I.

INTRODUCTION

Brandon Chow, a deputy with the San Diego County Sheriff's Office, challenges the trial court's denial of his petition for a writ of mandamus to require the San Diego County Civil Service Commission (Commission) to hear Chow's appeal from a written reprimand issued by his employer, the San Diego County Sheriff's Office (Sheriff's Office). Chow contends that the San Diego County Charter (Charter) requires the Commission to hear all administrative appeals from disciplinary actions taken by San Diego County (County) agency employers, including written reprimands.

Chow argues in the alternative that even if this court determines that the Commission is not required to hear his appeal, a writ nevertheless should issue requiring the Sheriff's Office to provide Chow with a "meaningful appeal" of his reprimand under a newly-instituted review procedure. Chow contends that the Public Safety Officers Bill of Rights, Government Code sections 3300 et seq.,[1] guarantees him the right to appeal his written reprimand to a decision maker outside of the Sheriff's Office, under section 3304, subdivision (b).[2]

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1 Subsequent statutory references are to the Government Code unless otherwise specified.

2 Section 3304, subdivision (b) states: "No punitive action, nor any denial of promotion on ground other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal."

We affirm the portion of the trial court's judgment denying Chow's petition for a writ of mandamus seeking to direct the Commission to hear Chow's appeal from the written reprimand. However, we reverse the portion of the trial court's judgment denying Chow's petition for an alternative writ to require the County, through the Sheriff's Office, to provide him with an administrative appeal conforming to the requirements of section 3304, subdivision (b).

II.

FACTUAL AND PROCEDURAL BACKGROUND

Chow received a written reprimand from the Sheriff's Office in November 2002. Later that month, Chow sought to have the Commission hear his appeal of the written reprimand. The Commission declined to hear Chow's appeal, citing Rule 7.3, subdivision (c), of the San Diego County Civil Service Rules (Civil Service Rules). Civil Service Rule 7.3, subdivision (c) provides in pertinent part:

> "Reprimands may not be appealed to the Commission. Review of a reprimand may be pursued through the grievance procedure applicable to the employee's classification."

On December 27, 2002, Chow and the San Diego County Deputy Sheriff's Association (DSA) filed a petition for a writ of mandamus in the Superior Court of San Diego County, seeking to have the court rule that the Public Safety Officers Bill of Rights (§§ 3300, et seq.), together with the Charter, requires the Commission to hear appeals of written reprimands. In the alternative, Chow sought the issuance of a writ acknowledging that the administrative appeal process then in place failed to provide for

meaningful review, as required by the Public Safety Officers Bill of Rights, and requiring the Sheriff's Office to provide him with a "meaningful review."

In November 2002, at the time Chow received the written reprimand, a Memorandum of Agreement (MOA) between the County and Chow's co-petitioner, the DSA, outlined the appeal process applicable to reprimands such as the one Chow received. Under this process, an officer wishing to contest an employment disciplinary action, including a written reprimand, was required to seek review by his or her immediate supervisor or manager, and, if dissatisfied, was to seek review through successively higher levels of management. If, after completing the internal review process, the officer remained dissatisfied with the result, that officer had the right to have a hearing before a neutral arbitrator. However, under the terms of the MOA, the arbitrator's decision was advisory only. The Sheriff retained final authority as to the disciplinary action. The arbitration costs were to be shared by the employee and the County.

While Chow's petition was pending before the trial court, the County and the DSA negotiated new grievance procedures applicable to deputy sheriffs under the MOA. In April 2003, the DSA and the County entered into a Letter of Understanding (LOU) which modified those portions of the MOA that dealt with the arbitration of disciplinary appeals. Pursuant to the LOU, a decision of the neutral arbitrator would be binding on the Sheriff, and the County would bear the arbitration costs.

On May 30, 2003, the trial court tentatively denied the writ petition on the basis that Rule 7.3 subdivision (c) precludes the appeal of reprimands to the Commission, and

also on the ground that the LOU rendered the DSA's concerns and interest in the case moot. The court requested further briefing on the issue of whether the petition was also moot as to Chow. After additional briefing on that issue and a third round of briefing on an intervening decision in *State Personnel Board v. Department of Personnel Administration* (2003) 111 Cal.App.4th 839, review granted (2003) 6 Cal.Rptr.3d 423, the trial court issued a final order on October 6, 2003, denying the writ. The court entered judgment on November 12, 2003, dismissing Chow's case in its entirety. Chow filed a notice of appeal on November 19, 2003. The DSA did not appeal the court's judgment dismissing its interests as moot.

III

DISCUSSION

A. The Commission Is Not Required to Hear Appeals of Written Reprimands

Chow first contends that the Commission is collaterally estopped from arguing that it need not hear all matters appealed pursuant to section 3304, subdivision (b). Appellant asserts that this Court's opinion in *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209 (*Caloca I*) determined that the Civil Service Commission is the appropriate body to hear appeals of matters falling within the scope of section 3304, subdivision (b).

The doctrine of collateral estoppel works to preclude the relitigation of issues previously decided in prior adjudications. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) However, collateral estoppel may be applied only if several requirements are fulfilled: (1) the issue to be precluded from relitigation must be identical to that decided

in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessary to the decision in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, a party to the former proceeding. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.) Here, the first three requirements are not met.

Caloca I considered whether a report by the County Law Enforcement Review Board (CLERB) was a "punitive action" for purposes of section 3303 such that an officer had the right to appeal it pursuant to section 3304 subdivision (b). (*Caloca I, supra,* 72 Cal.App.4th at p. 1212.) A panel of this court concluded that the CLERB report did constitute a "punitive action," and that the Commission was required to provide the deputy sheriffs "an opportunity for an administrative appeal of CLERB's findings against them." (*Id*. at p.1223.)

Here, in contrast, the parties do not dispute that the written reprimand at issue is a "punitive action" for which a peace officer must be granted the opportunity for an administrative appeal. Rather, the issue Chow raises through his petition is whether the Charter requires *the Commission* to hear administrative appeals of reprimands brought pursuant to section 3304 subdivision (b). The *Caloca I* court did not decide the issue whether the Commission is the *only* body authorized to hear appeals from matters appealed under section 3304 subdivision (b).

Further, the issue of the Commission's jurisdiction to hear all administrative appeals was neither litigated in *Caloca I* nor necessary to the court's decision. Rather, the

court noted in a footnote that the parties did not contest whether the "Civil Service Commission is the appropriate body to hear administrative appeals brought pursuant to Government Code section 3304, subdivision (b)." (*Caloca I*, *supra*, 72 Cal.App.4th at p. 1223, fn. 10.) Because the parties did not contest the issue, it follows that the question whether the Commission must hear all appeals brought pursuant to Government Code section 3304, subdivision (b) was not litigated in *Caloca I*. Further, the issue of *who* was to hear the officers' appeal in *Caloca I* did not have to be decided in order for the *Caloca I* court to conclude that the officers were entitled to an appeal under section 3304, subdivision (b). Clearly, the *Caloca I* court's observation that the parties in that case had not argued whether or not the Commission was the appropriate body to review the officers' appeals does not preclude us from giving full consideration to this issue now that it is squarely before us.

B. The San Diego County Charter Does Not Require the Commission to Hear Appeals of Written Reprimands

Chow asserts that the Charter makes the Commission the only proper hearing body for disciplinary appeals brought by County employees, including those brought by public safety officers pursuant to section 3304, subdivision (b). According to Chow, Civil Service Rule 7.3, subdivision (c) (Rule 7.3(c)), which requires that appeals of reprimands be pursued through the grievance procedure applicable to the employee's classification and not to the Commission, violates the terms of the Charter because it "inappropriately delegates the authority and the responsibilities" of the Commission as granted by the

Charter.[3] We conclude that the Charter does not require that the Commission hear every appeal from all disciplinary actions taken against a County employee, and in particular, the Charter does not require the Commission to hear every appeal by a public safety officer pursuant to section 3304, subdivision (b).

In reviewing a trial court's ruling on a writ of mandate, an appellate court is ordinarily confined to determining whether the findings and judgment of the trial court are supported by substantial evidence. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 502.) "This limitation, however, does not apply to resolution of questions of law where the facts are undisputed. In such cases, as in other instances involving matters of law, the appellate court is not bound by the trial court's decision, but may make its own determination. [Citation.]" (*Ibid*.) The parties here agree that the facts of this case are undisputed and that the issue presented is a question of law; we therefore review Chow's petition for a writ of mandate de novo.

Section 3304, subdivision (b) guarantees that public safety officers will be provided with "an opportunity for administrative appeal" of any "punitive action" taken against them by their employee agencies. However, "the procedural details for implementing the provisions for an administrative appeal are to be formulated by the local agency." (*Browning v. Block* (1985) 175 Cal.App.3d 423, 429.) Chow contends that the Charter provides the "procedural details" for implementing officers'

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[3] As noted above, Rule 7.3 (c) states in pertinent part: "Reprimands may not be appealed to the Commission. Review of a reprimand may be pursued through the grievance procedure applicable to the employee's classification."

administrative appeals, and that the "procedural details" of the Charter require that the Commission hear public safety officers' administrative appeals.

Chow relies principally on sections 904, 904.1 and 904.2 of article IX of the Charter to support his argument that the Commission must hear officers' appeals from written reprimands. These portions of the Charter provide:

> "**Section 904: General Duties of the Civil Service Commission**. The Commission is responsible for protecting the merit basis of the personnel system through its appellate authority, investigative powers, and review of Civil Service Rules . . . .
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> "**Section 904.1:** The Commission is the administrative appeals body for the County in personnel matters authorized by this Charter. Upon appeal, the Commission may affirm, revoke or modify any disciplinary order, and may make any appropriate orders in connection with appeals under its jurisdiction. The Commission's decisions shall be final, and shall be followed by the County unless overturned by the courts on appeal.
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> "**Section 904.2:** The Commission's appellate authority includes appeals from actions involving:
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> "(a) discipline of classified employees with permanent status; . . . ."

In construing the Charter, "[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Hasson v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Ibid.*)

Giving the words of the Charter their ordinary and usual meaning, the Charter's language that the "Commission's appellate authority includes appeals from actions involving: (a) discipline of classified employees with permanent status," unambiguously grants the Commission the authority to hear appeals from employees who seek review of any disciplinary action taken against them. However, the language of the statute does not unambiguously make the Commission the *exclusive* body to hear such appeals, nor does it *require* that the Commission hear every administrative appeal. The granting of authority does not necessarily imply that such authority must be acted upon in every instance. For the following reasons, we conclude that the Charter does not mandate that the Commission hear all appeals from disciplinary actions.

First, the Charter includes no language requiring the Commission to hear appeals of disciplinary orders. Statutory language mandating a certain action is distinct from language merely authorizing or permitting that action. (Cf. *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498 [noting that to prove liability under Govt. Code, § 815.6, plaintiff had to show public entity had not satisfied some mandatory duty, which meant plaintiff must show that statute required, not merely authorized or permitted, particular action].) Generally, the term "shall" has a compulsory or mandatory meaning when used in a statute. (*People v. Municipal Court* (1956) 145 Cal.App.2d 767, 775-776; see also Black's Law Dictionary, 5th ed. (1979) ["Shall. As used in statutes, contracts, or the like, this word is generally imperative or mandatory."].) Obviously, the synonyms "will" or

"must" may also be used to indicate a mandate.[4] The Charter uses none of these words to describe the Commission's authority to hear appeals from actions involving discipline. We decline to presume that the voters intended that the Charter require the Commission to hear every appeal from any disciplinary action taken against an employee, despite the absence of any terms that would signal that this authorization constitutes a mandate.

The legislative history of the Charter also supports our interpretation of the statutory language as being permissive rather than mandatory. Prior to its current version, the County Charter expressly included the provisions pertaining to employee discipline and appeal rights that are now included in the Civil Service Rules instead. The 1965 version of the Charter listed the specific grounds on which an employee could be disciplined and the types of disciplinary actions that could be appealed to the Commission. Under its terms, the 1965 Charter allowed only employees who had been "removed, suspended or reduced in rank or compensation" to appeal to the Commission. When the Charter was amended in 1978, effective January 8, 1979, the amended version also limited the right to appeal to the Commission to those orders that "removed, suspended or reduced in rank or compensation" a tenured employee. In 1980, the voters again amended the Charter. This time, however, many of the very specific details regarding employee discipline that had been in previous versions of the Charter were removed in a process of streamlining. In their place were provisions that these matters be

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4 Black's Law Dictionary, 5th ed. (1979) ["Will. v. An auxiliary verb commonly having the mandatory sense of 'shall' or 'must;'" "Must. This word, like the word 'shall,' is primarily of mandatory effect . . . ."]

contained in the Civil Service Rules. The details regarding employee discipline and appeal rights that until that time had been set forth in the Charter itself were subsequently found in the Civil Service Rules.

Further, the Charter leaves the power to define employees' "rights to appeal" to the Civil Service Rules, which are created by the Commission itself, pursuant to the approval of the County Board of Supervisors (Board).[5] The Charter gives the Commission control over defining the scope of, and processes for, appeals under its jurisdiction at section 910.1, subdivisions (k) and (l), which provide in pertinent part: "The Rules for the Classified and Executive Service shall include provisions for: . . . (k) the disciplining of employees in the Classified Service for cause and their rights of appeal; [and] (l) the appeal processes to be conducted under the jurisdiction of the Commission . . . ." The Charter allows the Rules to define whether or not a County employee has any right to appeal at all in certain circumstances. Interpreting the Charter to require that the Commission grant every employee an appeal to the Commission for any disciplinary action would render section 910.1, subdivision (j) essentially meaningless.

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5 The pertinent section of the Charter states:

> "**Section 910: Rules for Civil Service**. The Civil Service Rules, which have the force and effect of law, are implemented by the Personnel Director under the administrative jurisdiction of the Chief Administrative Officer. The Commission reviews proposed Rules and amendments and, after a public hearing, makes any modifications it deems appropriate, and transmits the Rules and amendments to the Board. The Board adopts or rejects, but may not modify, the Rules and amendments following review by the Commission . . . ."

The terms of the Charter, given their ordinary meaning and read in context, provide the Commission with the authority to determine the types of disciplinary actions that warrant the Commission's time and energy by according the Commission the opportunity to fashion the Civil Service Rules. Theoretically, the Civil Service Rules could broaden the scope of the Commission's appellate hearing authority to the outermost bounds delineated in the Charter. However, the Civil Service Rules as currently drafted provide that only appeals from orders of removal, suspension, or reduction in rank or compensation are of the type that warrant review by the Commission. (Civil Service Rule 7.3, subdivision (b).) In contrast, the Civil Service Rules provide that appeals from reprimands shall be heard through a different process. (Rule 7.3(c).)

In sum, although the language of the Charter would *permit* the Commission to hear all appeals from disciplinary actions if the Civil Service Rules granted every employee a right to appeal any disciplinary action to the Commission, the Charter language does not *require* the Commission to hear all disciplinary appeals, nor does it require the Commission to grant all employees the right to appeal to the Commission.

Second, the language of the Charter does not necessarily make the Commission the exclusive authority to hear all discipline-related appeals. We can find no limiting language, and Chow points to none, that would prevent the Commission from creating alternative appeal processes.[6] If the Commission and Board are granted the power to

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6 Citing to *California School Employees Assn. v. Personnel Com. of Parejo Valley Unified School Dist.* (1970) 3 Cal.3d 139, 144 (*Parejo Valley*), Chow suggests in a single sentence that the Commission cannot delegate its power to hear appeals because such

determine whether an employee even has any right to appeal, it follows that the Commission and Board also have the authority to determine the extent of that right, including whether or not that right includes an appeal to the Commission.

Pursuant to this power, the Commission and the Board have determined, through Rule 7.3(c), that an employee who receives a written reprimand does not have the right to appeal the reprimand to the Commission. We read nothing in the County's Charter that would prohibit the Commission and the Board from making such a rule. Rather, the Charter provides for the creation of rules delineating employee rights to appeal disciplinary actions.

However, Chow argues that section 910.1, subdivision (l) of the Charter, which provides that the Civil Service Rules shall include provisions for, inter alia, "the appeal processes to be conducted under the jurisdiction of the Commission" invalidates Rule 7.3(c). He contends that because Rule 7.3(c) requires an employee to seek review through an entity that is not the Commission, the rule creates an appeal process that is not "conducted under the jurisdiction of the Commission."

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power involves the exercise of judgment or discretion. For support, he relies on the *Parejo Valley* court's recitation of the rule that "powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*Ibid.*) However, the court in *Parejo Valley* had determined that the school district's board of trustees had exclusive jurisdiction to dismiss a bus driver. Application of the rule regarding delegation was contingent upon this determination. In contrast, we have concluded that the Charter does not require that only the Commission hear appeals from disciplinary actions. The general rule regarding delegation of discretionary powers is inapplicable to situations such as this, where non-exclusive authority has been granted.

In a broad sense, all appeals of disciplinary actions are "conducted under the jurisdiction of the Commission" since the Commission creates the Civil Service Rules, and the Rules govern all appeals, even those that are not heard by the Commission. However, even if we were to interpret the phrase "under the jurisdiction of the Commission" in its more limited sense, Chow's argument fails.[7] The requirement that the Civil Service Rules provide for the "appeal processes to be conducted under the jurisdiction of the Commission" would require only that the Rules supply the process to be followed during those appeals that *are* designated to be heard by the Commission. It would not require that the Commission hear all appeals.

C. Chow's Petition for an Alternative Writ Must Be Granted

Chow asserts that even if he is not entitled to a Civil Service Commission hearing, he is entitled, pursuant to section 3304, subdivision (b), to appeal procedures that provide him with "meaningful" review by an independent decision maker. He requests that we reverse the trial court's judgment denying his petition for a writ requiring the Sheriff to provide Chow with a "meaningful appeal" of his written reprimand.

The County contends that Chow cannot obtain relief at this point because he failed to exhaust the administrative remedies available to him. It is true that Chow bypassed the

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[7] The idea that "jurisdiction" may have a number of conceptual meanings has been recognized for years. For example, in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291, the Supreme Court noted: "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere

available options for administrative review and instead went directly to the superior court to seek an extraordinary writ. However, we conclude that neither Chow's failure to pursue an administrative remedy under the original MOA procedure nor his failure to seek review under the new LOU procedure bars him from obtaining relief.[8]

"'[T]he exhaustion doctrine does not implicate subject matter jurisdiction but rather is a "procedural prerequisite" "originally devised for convenience and efficiency" and now "followed under the doctrine of stare decisis . . . ."' [Citation.]" (*Doster v. County of San Diego* (1988) 203 Cal.App.3d 257, 260, italics omitted (*Doster*).) Although the rule of exhaustion of administrative remedies "remains a 'fundamental rule of procedure . . . courts have repeatedly recognized the rule is not inflexible dogma. [Citations.]" (*Ibid*.) Exceptions to the administrative exhaustion rule include situations where the agency is incapable of granting an adequate remedy (*Glendale City Employees' Assn. Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342) or when resorting to the administrative process would be futile because it is clear what the agency's decision would be (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520).

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procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional."

8 We note as a preliminary matter that the existence of a negotiated MOU does not preclude us from reviewing whether the appeal procedures provided for in the MOU comport with due process and/or section 3304, subdivision (b). (*Runyan v. Ellis* (1995) 40 Cal.App.4th 961, 964-965 [procedures established by an MOU are subject to scrutiny to determine whether they satisfy due process requirements and section 3304].)

1. Chow's Failure to Request a Hearing under the Original Appeal Procedure Does Not Preclude Judicial Relief

The County argues that Chow is not entitled to participate in binding arbitration at the County's expense now because he never invoked the grievance procedure that was in place at the time he filed his petition for a writ. However, "[i]t is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable [citation] or inadequate [citation]." (*Tiernan v. Trustees of the California State University and Colleges* (1982) 33 Cal.3d 211, 217.) " 'A party is not required to exhaust the available administrative remedies when those administrative procedures are the very source of the asserted injury. [Citation.]' [Citation.]" (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 621.) Here, the administrative procedures that were available to Chow at the time of his reprimand are the very source of Chow's asserted injury.

Believing the process available to him in November of 2002 to be inadequate under section 3304, subdivision (b) and the Charter, Chow bypassed the administrative process and instead sought relief from the court through a writ petition. Chow has consistently asserted that he was not required to utilize the original appeal procedure because the original procedure was legally insufficient. Chow was not seeking to have the court reverse his written reprimand. Rather, he challenged the adequacy of the administrative review procedure available to him under the MOA. Therefore, Chow's request for relief falls squarely within an exception to the exhaustion rule, and his petition is not barred for failure to exhaust administrative remedies.

2. Chow Did Not Receive An Opportunity for Administrative Appeal as Required Under Section 3304, Subdivision (b)

Chow contends that the appeal procedures available to him during his 45-day appeal window[9] did not comport with the mandate of the Public Safety Officers Bill of Rights. In particular, Chow contends that the procedures did not amount to the type of "administrative appeal" contemplated by section 3304, subdivision (b).[10]

Although section 3304 requires that an officer be provided with the opportunity for an administrative appeal, the statute does not specify how the appeal process is to be implemented. (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329.) "While the precise details of the procedure required by Government Code section 3304 are left to local law enforcement agencies [Citation], the law is clear that the administrative appeal provided by the Public Officers Bill of Rights requires 'an "independent reexamination"' of an order or decision made. [Citations.]" (*Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-444 (*Caloca II*).) "At a minimum, the reexamination must be conducted by someone who has not been involved in the initial determination. [Citations.]" (*Ibid.*) Further, "[a]n *independent decision maker* who must make factual findings subject to judicial review cannot simply rely on the determination of the

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9 Pursuant to Section B, Article 11 of the MOA, which was not altered by the LOU, a grievance must be filed in writing within 45 calendar days from "the date upon which the County is alleged to have failed to provide a condition of employment . . . or . . . from the time an employee might reasonably have been expected to have learned of the alleged failure." Any grievance not filed within the 45-day window "shall be void."

10 The parties do not contest that a written reprimand is considered a "punitive action" for purposes of the Public Safety Officers Bill of Rights pursuant to section 3303.

individual or *agency* that has initiated punitive action against a peace officer." (*Id*. at p. 444, italics added.) Further, section 3304, subdivision (b), ensures that an officer will be provided with a "full evidentiary hearing" on appeal. (*Giuffre, supra,* 76 Cal.App.4th at p. 1332.) Section 3304, subdivision (b) is not satisfied by a meeting with the city manager (*Runyan v. Ellis, supra*, 40 Cal.App.4th at p. 967) or a meeting with the sheriff-coroner on the basis of written reports (*Giuffre, supra,* 76 Cal.App.4th at p. 1332).

In this case, under the original MOA process—which was the only appeal process available to Chow at the time of his reprimand—a public safety officer seeking to challenge a written reprimand was required to first seek review of the reprimand by his or her immediate supervisor or manager. The officer was then required to seek review of the action through successively higher levels of management up to the Sheriff, in Chow's case. If still dissatisfied with management's response, the officer had the right to request a hearing before a neutral arbitrator, the costs of which were to be shared by the parties. However, the arbitrator's decision was not binding on the Sheriff, who had the ultimate decision-making power with regard to the disciplinary action.

This appeal process does not meet the requirements of section 3304, subdivision (b), as discussed in *Caloca II, Guiffre, or Runyan*. Although the MOA procedure allowed for a re-examination of the written reprimand by an independent and presumably neutral arbitrator, the arbitrator had no decision-making authority. Instead, the final determination was left up to the Sheriff, who had already made a determination regarding the reprimand, through the internal review process. This internal review process did not provide for a full evidentiary hearing in which the department had the burden of proof

and the officer was represented by counsel. Therefore, the appeal procedure available to Chow under the MOA failed to provide for a reexamination, through a full evidentiary hearing, by an "independent decision maker," as is required by case law. (See *Caloca II, supra*, 102 Cal.App.4th at p. 444; *Giuffre, supra,* 76 Cal.App.4th at p. 1332; *Runyan, supra,* 40 Cal.App.4th at p. 967.) We conclude that this appeal process was inadequate under section 3304, subdivision (b).

3. Chow's Failure to Request a Hearing under the New Procedure Does Not Preclude Judicial Relief

While Chow's writ petition was pending before the trial court, the County and DSA agreed to change the administrative appeal procedures for reprimands of public safety officers through a Letter of Understanding, dated April 4, 2003. The trial court denied Chow's request for an alternative writ on the basis that he "made no request for a hearing under the new procedure." The trial court apparently concluded that even if Chow had not been afforded the opportunity for "meaningful review" under the procedures set forth in the MOU, he had been provided the opportunity for "meaningful review" under the procedures adopted in the LOA. The trial court determined that Chow had failed to pursue his opportunity for "meaningful review" by failing to request a hearing under the new procedures once they were approved. We disagree.

As stated earlier, Chow received the reprimand on November 1, 2002. It is clear that if Chow had requested a hearing under the new procedure on April 4, 2003—the first date the new procedure was available to him—his request would have been considered a

"stale grievance" and therefore void under the unambiguous terms of the MOA.[11] Thus, Chow did not have an opportunity for a "meaningful review" under the new procedures, despite the fact that the new procedures for appeals of reprimands came into existence while his petition was pending before the court.

4. Chow's Writ Petition Should Be Granted In Part

We conclude that Chow's petition for a writ requiring the County to provide him with an administrative appeal should be granted because Chow is entitled to an opportunity for an administrative appeal that satisfies the requirements of section 3304, subdivision (b).

"[T]wo basic requirements are essential to the issuance of the writ: (1) [a] clear, present and usually ministerial duty on the part of the respondent [citations]; and (2) a clear, present, and beneficial right in the petitioner to the performance of that duty. [Citation]." (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 813; see generally 8 Witkin Cal. Proc. (4th ed. 1997) Writs, § 72, p. 853.) Those two requirements are met here. The County has a duty, pursuant to section 3304, subdivision (b), to provide Chow with an independent reexamination and full evidentiary hearing of the written reprimand by a decision-maker who was not involved in the initial

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11 The County suggests that Chow's argument on this point is "wholly speculative" because Chow never tried to invoke the new procedure. However, in light of the clear terms of the procedural rules set out in the MOA governing grievance procedures, the only way Chow's request would not have been futile rests on the assumption that the Sheriff's Office would have deviated from established procedures and granted Chow an exemption from the rules in order to provide him an appeal opportunity under the new procedures, more than 135 days after issuance of the reprimand.

determination—i.e., someone outside of the Sheriff's Office.[12] Consequently, Chow's petition for a writ requiring the County to provide him with a review procedure that is sufficient under the Public Safety Officers Bill of Rights should be granted.

IV

CONCLUSION

The County is not collaterally estopped from litigating the issue whether all disciplinary matters appealed pursuant section 3304 subdivision (b) must be heard by the Commission. Further, neither section 3304, subdivision (b), nor the San Diego County Charter requires the Commission to hear all administrative appeals from punitive disciplinary actions taken against public safety officers.

However, Chow is entitled to an administrative appeal pursuant to section 3304, subdivision (b), because the original appeal procedure available to him was inadequate under the Public Safety Officers Bill of Rights. The fact that Chow did not request a hearing under the new appeal procedures agreed to by the County and the DSA in April of 2003 does not bar his right to judicial relief because requesting a hearing under the new procedures would have been futile.

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[12] Although we limit our holding to require merely that the County offer Chow a review process that comports with the requirements of section 3304, subdivision (b), and decline to require the County to provide a specific process, we think it valuable to note that the new administrative appeal process outlined in the LOU appears to rectify the deficiencies of the prior process. Chow's request that he be granted an opportunity for a hearing under the new process implicitly acknowledges the sufficiency of the process under section 3304, subdivision (b), as well.

V

DISPOSITION

The judgment of the superior court is affirmed insofar as it denies Chow's petition for a writ of mandate directing the Commission to hear and decide Chow's section 3304, subdivision (b), appeal of a written reprimand. The judgment of the superior court is reversed insofar as it denies Chow's petition for a writ of mandate directing the County to provide Chow with an administrative appeal sufficient to meet the minimum requirements of section 3304, subdivision (b). The cause is remanded to the superior court with directions to enter judgment granting Chow's petition for a writ requiring the County to provide him with a section 3304, subdivision (b) administrative appeal of his written reprimand. The parties are to bear their own costs on appeal.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.